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11 **UNITED STATES DISTRICT COURT**
12 **CENTRAL DISTRICT OF CALIFORNIA, SANTA ANA**

13 **UNITED STATES OF AMERICA,**

14 **Plaintiff,**

15 **v.**

16 **KENNETH KETNER, and**
17 **ALLEN JOHNSON**

18 **S.A.**
19 **Case Nos. 05-CR-36-ALL**

20 **Judge James V. Selna**

21 **DEFENDANT KENNETH KETNER'S**
22 **NOTICE OF MOTION AND MOTION**
23 **TO IDENTIFY AND COMPEL**
24 **DOCUMENTS AND EXCULPATORY**
25 **EVIDENCE; MEMORANDUM OF**
26 **POINTS AND AUTHORITIES IN**
27 **SUPPORT THEREOF**

28 **Date: September 19, 2005**
Time: 9:00 a.m.
Ctrm: 10C

Defendant Kenneth Ketner ("KETNER"), through his undersigned counsel of record, hereby gives notice that on September 19, 2005 at 9:00 a.m., or as soon thereafter as the matter can be heard by the court, in courtroom 10C of the above entitled court will and hereby does move for an order requiring that the government do the following:

1. Immediately disclose all potentially material recordings, transcripts, reports and notes resulting from, regarding, referring or relating to the investigation and prosecution by the Government of KETNER's case, including any exculpatory or favorable evidence.

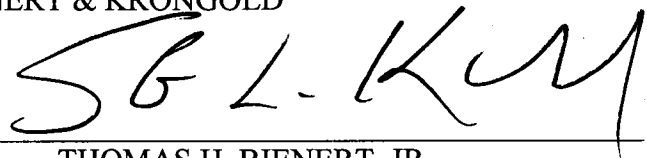
2. Identify all documents and other items that the government intends to mark as exhibits or to use during examination of witnesses;
3. Identify all documents or evidence that potentially contains Brady information;
4. Identify all documents or evidence that potentially contains Giglio information; and
5. Provide all of the documents referred to in the indictment.

This motion is brought pursuant to Rules 12 and 16 of the Federal Rules of Criminal Procedure, Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, and the Fifth and Sixth Amendments to the United States Constitution. This motion is based upon the instant notice of motion and motion, the attached memorandum of points and authorities in support thereof, the records and files in this action, and any and all other matters that may be presented prior to or at the time of the hearing.

DATED: September 12, 2005

BIENERT & KRONGOLD

By:



THOMAS H. BIENERT, JR.

STEVEN L. KRONGOLD

JOEL M. WEINSTEIN

Attorneys for Defendant KENNETH KETNER

MEMORANDUM OF POINTS AND AUTHORITIES**I INTRODUCTION**

Defendant Kenneth Ketner ("KETNER") is charged in a six- count indictment with Bank Fraud, Honest Services Wire Fraud, Wire Fraud, Money Laundering Conspiracy, Engaging in Monetary Transactions in Property Derived from Specified Unlawful Activities, and Aiding and Abetting. Essentially, the indictment alleges that KETNER committed these various crimes by arranging for loans on properties funded by and through Mortgage Capital Resource Corporation, a California Corporation ("MCR") through various means to the detriment of creditors Household Commercial Financial Service a warehouse lender based in Illinois ("Household") and Republic Bank, a bank insured by the Federal Deposit Insurance Corporation ("Republic").

Based on the charges in the matter, an important evidentiary aspect of the case will be the degree to which KETNER, who was at times the head of MCR but involved in many other projects as well, had knowledge of certain financial transactions and loans. Thus, witness testimony regarding KETNER's business practices and actual knowledge of particular transactions and loans is significant. Any information suggesting that KETNER lacked involvement or knowledge in relevant practices or transactions is exculpatory as it tends to negate knowledge of the alleged wrongdoing.

Based on the allegations and charges in this matter, KETNER believes that the government will call several witnesses at trial to testify about whom there is significant evidence of wrongdoing. Those witnesses include Val Benincosa, Randy Bristol and Alan Johnson. Yet, to date the government has not identified a single document or item that it expects to introduce at trial. ~~Instead~~, the government claims it has not one piece of exculpatory evidence in this case. In fact, other than some reports related to Alan Johnson that this Court ordered disclosed as part of an unrelated prior motion, the government has produced *no reports* or potential impeachment information regarding any witnesses.

What the government has produced instead is a partial "discovery dump" where, after disclosing its possession of the some fifty-one boxes of documents that will ultimately be

1 discoverable, it produced 36 of them and refuses to produce the other 15 or any information
2 from them. The government claims that all of the additional fifteen boxes include work-product
3 and information that need not be produced.

4 Defendant is informed and believes that the government has exculpatory information,
5 including witnesses who provided evidence of KETNER's non-involvement in relevant matters
6 and impeachment information for its witnesses. Furthermore, defendant contests the
7 government's view that it need not produce evidence prepared and presented to the grand jury or
8 that will ultimately be produced at trial. Defendant should not be required to sift through dozens
9 of boxes of documents in order to first identify the evidentiary basis of the government's case so
10 that he can defend himself.

11 Defense counsel and government counsel have addressed these issues and have been
12 unable to resolve them, warranting the filing of this motion.

13 **II. THE PROSECUTION HAS AN OBLIGATION TO DISCLOSE AND IDENTIFY**
14 **ALL INFORMATION MATERIAL TO THE CASE, INCLUDING ITEMS IT**
15 **INTENDS TO USE AT TRIAL, EXCULPATORY EVIDENCE AND**
INFORMATION THAT COULD EFFECT THE CREDIBILITY OF THEIR
WITNESSES

16 Rule 16 requires the government to disclose, upon the defense's request, items "material
17 to preparing the defense," as well as items the government "intends to use in its case-in-chief."
18 Fed.R.Crim P. 16(a)(1)(E)(i)&(ii); see also United States v. Reeves, 892 F.2d 1223, 1226 (5th
19 Cir. 1990); United States v. Vue, 13 F.3d 1206, 1208 (8th Cir. 1994). This "rule is intended to
20 prescribe the minimum amount of discovery to which the parties are entitled. It is not intended
21 to limit the judge's discretion to order broader discovery in appropriate cases." Advisory
22 Committee Note on 1974 Amendment to Rule 16 (emphasis added).

23 The government is in possession of dozens of boxes of evidence and should be ordered to
24 disclose to defendant items it intends to use at trial. Failure to make such disclosures is
25 precluding defendant from adequately preparing for his defense.

26 The due process clause of the United States Constitution, Rule 16 of the Federal Rules of
27 Criminal Procedure, as well as case law, impose a duty on the prosecution to disclose to the
28 defense upon request, any information favorable to the accused within the prosecutor's

possession, either actual or constructive, that is material to defendant's guilt or to sentencing. Brady v. Maryland, 373 US 83, 87 (1963) see also United States v. Bagley, 473 U.S. 667, 682 (1985). This principle imposes upon prosecutorial authorities a strict duty to disclose and identify all material evidence favorable to the defense whether or not it relates directly to the question of guilt and whether or not a request for a disclosure has been made. Giglio v. United States, 405 U.S. 150 (1972).

The prosecution's discovery obligation has been enunciated by the United States Supreme Court:

The State's obligation is not to convict, but to see that, so far as possible, truth emerges. This is also the ultimate statement of its responsibility to provide a fair trial under the Due Process Clause of the Fourteenth Amendment. No respectable interest of the State is served by its concealment of information which is material, generously conceived, to the case, including all possible defenses

Giles v. Maryland, 386 US 66, 98 (1967).

In this instance, since the rule announced in Brady is premised on defendant's right to receive a fair trial, the government should be required to adopt a more liberal approach to disclosure in this case. Brady, 387 U.S. at 87; see also Kyles v. Whitley, 514 U.S. 419, 439 (1995) ("[A] prosecutor anxious about tacking too close to the wind will disclose a favorable piece of evidence...This is as it should be."); United States v. McVeigh, 954 F. Supp. 1411 (D. Colo. 1997) (Matsch, J.) ("Due Process requires the government lawyers to resolve their doubts in favor of disclosure."). Such an approach is necessary both to ensure "that justice shall be done," and "to preserve the criminal trial, as *distinct from the prosecutor's private deliberation*, as chosen forum for ascertaining the truth about criminal accusations." Kyles, 514 U.S. at 439-40 (emphasis added).

Moreover, the prosecution has a duty to learn of and obtain all favorable evidence in the possession of others acting on their behalf, including the police. Kyles v. Whitley, 115 S. Ct. 1555, 1567 (1995); United States v. Wood, 57 F.3d 733, 737 (9th Cir. 1995) (prosecutor is charged with knowledge of material known to FDA). The test for materiality is whether the

requested evidence *might* affect the outcome of the trial. United States v. Agurs, 427 US 97 (1976). This includes evidence which could affect the credibility of any government witness. See Giglio, 405 U.S. 150, 154. Further, it includes evidence of bias, motive to lie or exaggerate, prior bad acts of dishonesty or prior criminal convictions. See Generally United States v. Able, 469 U.S. 45 (1984). Accordingly, evidence favorable to KETNER includes not only evidence tending to exculpate him, but any information that tends to impeach the government's evidence or witnesses. See Giglio, 405 U.S. at 154; Bagley, 473 U.S. at 676. Such evidence should include:

- The complete criminal history of any witness the government plans to use at trial. Brady v. Maryland 373 U.S. 83 (1963).
- Any evidence that a witness has made a false statement, whether or not under oath. U.S. v. Strifler 851 F.2d 1197 (9th Cir., 1988)
- Any evidence that a witness has made any inconsistent, contradictory or false statements, including any other evidence show bias or motive to fabricate by the informant. Pennsylvania vs. Ritchie 107 S.Ct. 989 (1987); U.S. vs. Steinberg 99 F.3rd 1486 (9th Cir., 1996)
- Any express or implicit promise, understanding, offer of immunity or lesser sentence in exchange for a witness's cooperation in this or any other case, Giglio v. U.S., *supra*; U.S. vs. Shaffer 789 F.2d 682 (9th Cir. 1986), together with copies of any plea bargain or agreement regarding said cooperation.
- All e-mail or electronic data in any form involving the witnesses and/or defendant. 18 U.S.C §2510-2520; 18 U.S.C §3504.
- All electronic surveillance of the defendants in any form, together with any wiretaps and accompanying applications. Id.
- All recordings, including electronic, written, or otherwise, of any conversations involving any witnesses and/or defendants.

1 The government has not produced such materials in this case. Thus far, it has primarily
 2 limited its production to documents seized by agents from various locations. In doing so, ~~it is~~
 3 ~~concealing~~ notes and reports of agents in this case, including potentially exculpatory evidence
 4 and the references to potentially exculpatory witnesses contained therein. Included in such
 5 exculpatory evidence, is information by witnesses indicating that defendant Ketner was not
 6 involved in certain financial aspects of MCR.

7 **III. THE GOVERNMENT'S "DISCOVERY DUMP" OF DOZENS OF BOXES,**
 8 **WITHOUT IDENTIFYING PARTICULAR DOCUMENTS OR**
 9 **INFORMATION, DOES NOT MEET THE GOVERNMENT'S DISCOVERY**
 10 **OBLIGATION**

11 Instead of identifying relevant information required by discovery rules, the government
 12 simply granted the defense access to a large voluminous collection of incomplete discovery
 13 inviting them to find an exculpatory "needle in a haystack". The Government's position is
 14 inconsistent with the fundamental constitutional protections afforded by Brady. The
 15 government's duty to comply with Brady is not fulfilled, in cases such as this, where the
 16 prosecution buries the defendant with discovery and ignores its duty to expose the truth.

17 In United States v. Bortnovsky, 820 F.2d 572, 574-575 (2d Cir. 1987), the Second Circuit
 18 found:

19 We conclude that appellants were hindered in preparing their defense by the
 20 district court's failure to compel the Government to reveal crucial information:
 21 the dates of the fake burglaries and the identity of the three fraudulent
 22 documents. Appellants were forced to explain the events surrounding eight
 23 actual burglaries and to confront numerous documents unrelated to the charges
 24 pending. In effect, the burden of proof impermissibly was shifted to
 25 appellants. *While we commend the Government for cooperating in the turning
 26 over of documents prior to trial, we do not look with favor on the manner in
 27 which the Government conducted the prosecution. The relevance of key events
 28 was shrouded in mystery at the commencement of and throughout the trial.
 The Government did not fulfill its obligation merely by providing mountains of
 documents to defense counsel who were left unguided as to which documents
 would be proven falsified or which of some fifteen burglaries would be
 demonstrated to be staged.*

(emphasis added); see also United States v. Turkish, 458 F.Supp.874, 882 (S.D.N.Y. 1978)
 (granting defense motion directing the government to indicate which of the approximately
 25,000 documents relating to the case in the government's possession it intended to use at trial,
 rather than "bury[ing] the defendant in paper" by merely making all of the documents available.)

1 In United States v. Poindexter, 727 F.Supp. 1470 (D.D.C. 1989), the government
2 attempted to satisfy its obligations under Brady by turning over large volumes of discovery.
3 According to the Poindexter Court:

4 The government has produced documents that it intends to use in its case-in-
5 chief, but defendant contends that, with respect to financial information and
6 various calendar and diary pages, it has done no more than to identify several
thousand pages, any of which it "may" rely on at trial. This broad brush
approach, defendant contends, is not sufficient to meet its obligations. The
Court agrees.

7 While the government's case or strategy may change in advance of trial or
8 even during trial, there is no reason why it cannot be more specific as to which
9 documents it currently intends to use, and there are many reasons, grounded in
fairness to the defendant, the protection of his rights, and not least Rule
16(a)(1)(C), why it should be.

10 Within thirty days of the issuance of this Order, the government shall identify
11 with greater specificity those among these thousands of documents in the
12 financial, calendar, and diary areas that it intends to use at trial. This
13 notification will not prevent the government from later introducing other
documents from these materials on a limited scale, but it will give the
defendant some notice as to which among the thousands of documents are
likely to be part of the government's case-in-chief.

14 Id. at 1484; United States v. Turkish, 458 F.Supp. 874, 882 (S.D.N.Y.1978), *aff'd*, 623 F.2d 769
15 (2nd Cir.1980).

16 This Court should order the government to honor its duties and produce
17 meaningful discovery by identifying exhibits, Brady and Giglio material.

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1 **IV. CONCLUSION**

2 For the foregoing reasons, KETNER, by and through his counsel, respectfully requests
3 that this Court order the government to:

- 4 (1) Identify the documents it intends to use at trial;
5 (2) Identify and produce all evidence relating to the credibility or bias of
6 witnesses; and
7 (3) Identify and produce all exculpatory evidence and/or potentially favorable
8 to KETNER's defense.

9 Respectfully submitted,

10
11 DATED: September 12, 2005

BIENERT & KRONGOLD

12
13 By: 

14 THOMAS H. BIENERT, JR.

15 STEVEN L. KRONGOLD

16 JOEL M. WEINSTEIN

17 Attorneys for Defendant KENNETH KETNER
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CERTIFICATE OF SERVICE

I, Janine Philips, declare,

That I am a citizen of the United States and am a resident or employed in Orange County, California; that my business address is 115 Avenida Miramar, San Clemente, California 92672; that I am over the age of 18 and not a party to the above-entitled action;

That I am employed by the Thomas Bienert of Bienert & Krongold who is a member of the United States District Court for the Central District of California, at whose direction I served a copy of **DEFENDANT KENNETH KETNER'S MOTION TO IDENTIFY AND COMPEL DOCUMENTS AND EXCULPATORY EVIDENCE; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF** on the interested parties in this action as follows:

 BY MAIL: I am "readily familiar" with Bienert & Krongold's practice for collecting and processing mail with the United States Postal Service. Under that practice, it would be deposited with the United States Postal Service that same day in the ordinary course of business. Such envelope(s) were placed for collection and mailing with postage thereon fully prepaid at San Clemente, California on that same day following the ordinary business practices addressed to:

 BY FACIMILE: On said date, I caused said document(s) to be transmitted by facsimile. The telephone number of the sending facsimile was (949) 496-6753. The name(s) and facsimile machine telephone number(s) of the person(s) served are set forth in the service list. The document was transmitted by facsimile transmission, and the sending facsimile machine properly issued a transmission report confirming that the transmission was complete and without error.

 BY FEDEX: I deposited such document in a box or other facility regularly maintained by FedEx, or delivered such document(s) to a courier or driver authorized by FedEx with delivery fees paid or provided for, addressed to the person(s) being served as follows:

 X **BY HAND DELIVERY:** I caused to have delivered such envelope(s) by hand to the office of the person being served via First Legal as follows

SEE ATTACHED SERVICE LIST

This certificate was executed on September 12, 2005, at San Clemente, California.

I certify under penalty of perjury that the foregoing is true and correct.



Janine Philips

SERVICE LIST
USA v. Ketner
Case No. 05-CR-36-ALL

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